

Louisiana Law Review

Volume 60 | Number 3
Spring 2000

Principles of Contractual Interpretation

Patrick S. Ottinger

Repository Citation

Patrick S. Ottinger, *Principles of Contractual Interpretation*, 60 La. L. Rev. (2000)
Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol60/iss3/4>

This Article is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.

Principles of Contractual Interpretation

Patrick S. Ottinger*

TABLE OF CONTENTS

I.	Introduction	766
A.	General Introduction	766
B.	Contract Formation	767
1.	Preliminary Agreements	767
2.	Reformation of a Contract	769
C.	Express Contractual Provisions	769
1.	Limitations on Freedom of Contract Imposed by Public Policy	769
2.	Construction Affected by Explicit Language	770
D.	Province of Courts in Contractual Interpretation	771
II.	Determining the Parties' Intent	772
A.	General Rules in Ascertaining Intent	772
1.	Deletions Deemed Not Written	772
2.	Precatory Terms Deemed Not Written	774
3.	Subsequent Additions to Printed Language	774
4.	Missing Word Supplied by Judicial Interpretation	776
5.	Conformance to Object of the Contract	777
B.	Resort to Extrinsic Evidence	778
1.	Words of Art and Technical Terms	778
2.	Role of Custom and Usage	779
3.	Course of Dealing	780
4.	Equity	781
5.	Resort to Other Contracts of a Like Nature	782
6.	Parol Evidence	783
C.	Methods of Reasoning in Contractual Interpretation	783
1.	The "Greater Includes the Lesser"	783
2.	<i>Ejusdem Generis</i> Doctrine	784
3.	<i>Inclusio Unius Est Exclusio Alterius</i> Doctrine	785
D.	When All Else Fails—The Aid of Presumptions in Contractual Interpretation	786
1.	Standard Form Contracts	786
2.	Ambiguity Construed Against Draftsman	787
3.	Strict Construction	788
a.	Penalty Provisions	788

Copyright 2000, by LOUISIANA LAW REVIEW.

* Adjunct Professor of Law, Paul M. Hebert Law Center; Member, Louisiana and Texas Bars. Reprinted From, *Start Spreading the News* . . . New York, New York, Multi-Topic CLE Seminar, Nov. 21-23, 1998; Published by the Louisiana State Bar Association, 601 St. Charles Ave., New Orleans, La. 70130.

b. Interpretation of Predial Servitudes	789
c. As Directed by Positive Law	790
III. Conclusion	790

I. INTRODUCTION

A. General Introduction

The most fundamental tenet regulating the interpretation of contracts is that the "[i]nterpretation of a contract is the determination of the common intent of the parties."¹ As a corollary, "[w]hen the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent."² While these provisions clearly state the primary goal of the interpretative process, certain principles or "tools" of interpretation have been provided by the redactors of the Louisiana Civil Code and by the courts. Whether legislatively or jurisprudentially provided, these principles of contractual interpretation are important both to the practitioner and the business person who is called upon to ascertain the meaning and import of a contract.

"The threshold inquiry is whether the contract's terms are ambiguous or explicit. If the language of the contract provisions are found to be explicit and unambiguous, no additional evidence can be considered."³ On the other hand, when the contract terms are unclear or ambiguous, "the court may go beyond the original agreement to determine the true intent of the parties."⁴

The principles hereinafter discussed do not exist in a vacuum. They are, to be sure, only principles or "tools" to be employed in the overall context of the interpretative process. It is for this reason both helpful and necessary to review certain jurisprudential statements of the principles by which contracts are to be interpreted.

"Legal agreements have the effect of law upon the parties, and as they bind themselves they shall be held to a full performance of the obligations flowing therefrom."⁵ "Freedom of contract" signifies that parties to an agreement have the right and power to construct their own bargains. . . . In a free enterprise system, parties are free to contract except for those instances where the government places restrictions for reasons of public policy."⁶

To determine the parties' intent, a court must look to the words and provisions of the contract first; when words and provisions are clear and explicit, no further interpretation may be made in search of the parties' intent, but, even when the

1. La. Civ. Code art. 2045.

2. La. Civ. Code art. 2046. *Maloney v. Oak Builders, Inc.*, 256 La. 85, 235 So. 2d 386 (1970); *Cashio v. Shoriak*, 481 So. 2d 1013, 1015 (La. 1986).

3. *Frischhertz Elec. Co., Inc. v. Housing Auth. of New Orleans*, 534 So. 2d 1310, 1312 (La. App. 4th Cir. 1988), *writ denied*, 536 So. 2d 1236 (La. 1989).

4. *Rabenhorst Funeral Home, Inc. v. Tessier*, 674 So. 2d 1164 (La. App. 1st Cir. 1996).

5. *Kean v. Lemaire*, 451 So. 2d 151, 153-54 (La. App. 1st Cir. 1984).

6. *Louisiana Smoked Products, Inc. v. Savoie's Sausage and Food Products, Inc.*, 696 So. 2d 1373, 1380 (La. 1997).

language of a contract is clear, a court should refrain from construing the contract so as to lead to absurd consequences.⁷ However, construction of contracts "does not authorize perversion of language or the creation of ambiguity where none exists and does not authorize courts to make a new contract where the language employed expresses the true intent of the parties."⁸

In stating that no "further" interpretation is appropriate when "the words of a contract are clear and explicit and lead to no absurd consequences," Louisiana Civil Code article 2046 recognizes that the threshold inquiry as to a contract's clarity is itself a process of interpretation. "For that reason, Article 2046 provides that no further interpretation is needed instead of providing that no interpretation at all is to take place."⁹

This paper will examine the several, distinct principles to which courts might resort in order to ascertain and, hence, effectuate the intention of contracting parties. An understanding of these principles is promoted by first considering the very process of contract formation and the role of contractual freedom inherent in our commercial system. The paper then discusses the particular rules of interpretation and the context in which each exists as determined by the nature or form of the contract involved.

B. Contract Formation

1. Preliminary Agreements

According to Louisiana Civil Code article 1927, a "contract is formed by the consent of the parties established through offer and acceptance." This article embodies the notion of "meeting of the minds," which is required to form a valid contract. As a general proposition, except for those contracts which, as a matter of law and validity, must be in writing,¹⁰ a contract need not be in writing to be enforceable.¹¹ Moreover, unless the parties have contemplated otherwise, the contract need not be in a certain form.¹²

7. *Amend v. McCabe*, 664 So. 2d 1183, 1187 (La. 1995).

8. *Belle Pass Terminal, Inc. v. Jolin, Inc.*, 634 So. 2d 466, 480 (La. App. 1st Cir. 1994), *writ denied*, 638 So. 2d 1094 (La. 1994), *reconsideration denied*, 640 So. 2d 258 (La. 1994), *reconsideration denied*, 642 So. 2d 185 (La. 1994).

9. *Exposé des Motifs* of the Projet of Titles III and IV of Book III of the Civil Code of Louisiana, Chapter 13 at 67.

10. *E.g.*, suretyship (Article 3038), transaction (Article 3071), conventional mortgage (Article 3287). See La. Civ. Code art. 1832. ("When the law requires a contract to be in written form, the contract may not be proved by testimony or by presumption, unless the written instrument has been destroyed, lost, or stolen.").

11. Self evidently, the *existence* of an oral agreement is subject to the issue of proof, which is not ordinarily presented with an agreement evidenced in writing. See La. Civ. Code art. 1831. ("A party who demands performance of an obligation must prove the existence of the obligation.").

12. La. Civ. Code art. 1947, provides that, "[w]hen, in the absence of a legal requirement, the parties have contemplated a certain form, it is presumed that they do not intend to be bound until the contract is executed in that form."

It is not uncommon for parties to enter into a preliminary or interim agreement prior to the execution of a more formal agreement. In these cases, the issue might arise whether the parties are bound prior to the execution of the later agreement or, in some cases, if the later agreement is never executed.

One arguing against the existence of a binding agreement prior to the execution of the later, more formal or comprehensive agreement will urge that the first document is nothing more than an "agreement to agree" and that, without the confection of the second agreement, there is no binding contract. On the other hand, it may be argued that the parties are bound by the preliminary or interim agreement, notwithstanding that a more formal agreement has not been executed.

The courts have held that "an agreement between parties, where their minds have met upon all essentials, constitutes a contract between them and binds them at once although they may have agreed that they would thereafter execute a formal instrument containing the terms of their present agreement."¹³ Where it has been agreed between the parties that an agreement shall be reduced to writing, the contract is not complete until it is written and signed by all the parties.¹⁴

In *Chevron U.S.A., Inc. v. Martin Exploration Co.*,¹⁵ the language of a written agreement characterized the agreement as "preliminary" and seemed to suggest that the execution of a more formal or comprehensive agreement was intended by the parties. The court of appeal held that this reference to a "preliminary" agreement and other language which suggested further negotiation between the parties, made the agreement an "agreement to agree" which was not enforceable.¹⁶ The supreme court reversed, finding that use of the word *preliminary* "does not preclude the agreement from being final until later agreements are reached, or from being the only agreement in the event that no other agreements are confectioned."¹⁷ Moreover, the supreme court found that the reference in the so-called "preliminary agreement" to a document "finalizing the points listed above" did not evince an intent to be bound only upon the execution of a later instrument. Nor did an allusion to future "negotiations" render the preliminary agreement non-binding. To the contrary, the court held that the document was binding because it sufficiently reflected the intent of the parties to be bound.¹⁸

Whether or not the parties intend to be bound if a subsequent written agreement is not executed is a question of fact.¹⁹ As such, it is subject to the "clearly erroneous" standard of review.²⁰

13. *Mermelstein v. Schwab*, 64 So. 2d 37, 38 (La. App. Orl. Cir. 1953).

14. *Breaux Brothers Const. Co. v. Associated Contractors, Inc.*, 226 La. 720, 77 So. 2d 17 (1954).

15. 447 So. 2d 469 (La. 1984).

16. 432 So. 2d 886 (La. App. 1st Cir. 1983).

17. *Chevron*, 447 So. 2d at 472.

18. *Id.* See also *Newport Limited v. Sears, Roebuck & Co.*, 6 F.3d 1058, 1065 (5th Cir. 1993), *cert. denied*, 512 U.S. 1221 (1994).

19. *Laroussini v. Werlein*, 52 La. Ann. 424, 27 So. 89 (La. 1899).

20. *Baldwin v. Bass*, 685 So. 2d 436 (La. App. 2d Cir. 1996) *writ denied*, 690 So. 2d 20 (La. 1997).

2. *Reformation of a Contract*

If, upon a proper interpretation of a contract, the contract is found not to express the intention of the parties, an action might lie to "reform" it in order that it might be made to express the true intention of the parties. "Reformation of a contract is an equitable remedy available to a contracting party when the instrument recites terms to which neither party agreed. Even if the language utilized is clear and unambiguous, parol evidence is admissible to establish that the contract does not embody an agreement to which there was mutual assent."²¹

In order for reformation to be a remedy, the error must be mutual.²² A "mutual mistake" was defined in *M.R. Building Corporation v. Bayou Utilities, Inc.*²³ as "a mistake shared by both parties to the instrument at the time of reducing their agreement to writing, and the mistake is mutual if the contract has been written in terms which violate the understanding of both parties; that is, if it appears that both have done what neither intended."²⁴

Where the error exists in reference to an immovable subject to alienation, the right to seek reformation follows the immovable.²⁵ However, a "third party taking rights on the faith of the public record is protected and cannot be held to provisions which might be contained in a document after it is reformed for simple error."²⁶

C. *Express Contractual Provisions*

1. *Limitations on Freedom of Contract Imposed by Public Policy*

Under Louisiana Civil Code article 1971, "[p]arties are free to contract for any object that is lawful, possible, and determined or determinable." This is a corollary to the proposition that "[p]ersons may not by their juridical acts derogate from laws enacted for the protection of the public interest. Any act in derogation of such laws is an absolute nullity."²⁷ These rules articulate the principle that "freedom of contract" is limited only by those parameters which the legislature imposes in order to promote public policy. Hence, there are some contractual provisions which, despite the clear intention of the parties, are unenforceable as a matter of law. In such cases, the concept of "contractual interpretation" is not relevant except to determine that a given provision is in fact implicated by public policy.²⁸

21. *Valhi, Inc. v. Zapata Corp.*, 365 So. 2d 867, 870 (La. App. 4th Cir. 1978).

22. *Pat S. Todd Oil Co. Inc. v. Wall*, 581 So. 2d 333, 336 (La. App. 3d Cir.), *writ denied*, 585 So. 2d 569 (La. 1991).

23. 637 So. 2d 614 (La. App. 2d Cir. 1994).

24. *Id.* at 616.

25. *Id.* at 617.

26. *Morrison v. D & L Partnership*, 499 So. 2d 988, 990 (La. App. 3d Cir. 1986).

27. La. Civ. Code art. 7.

28. Certain codal or statutory provisions announce or recognize limitations on "freedom of contract." See e.g., La. R.S. 9:2780 (1991 and Supp. 2000) (contractual indemnity provisions); La. Civ. Code art. 2004 (provision which, "in advance, excludes or limits the liability of one party for

2. Construction Affected by Explicit Language

The parties to a contract might affect the interpretation of the agreement by using language that indicates which, of several disparate provisions, is to take precedence over the other. The most common verbiage of this type is the phrase "anything herein contained to the contrary notwithstanding," or words to that effect. When used, this phrase indicates that the provision which follows the opening phrase is to be given effect to the exclusion of any other provisions, which would otherwise seem to be in conflict therewith. The parties should take care not to use the phrase more than once in order to avoid conflict.

As one court has observed, the "use of triple words is apparently characteristic of the legal profession."²⁹ Thus, the party who drafts the agreement will often prepare an act of sale to state that the vendor does "sell, bargain, transfer and convey," rather than (as would be legally sufficient) merely "sell."³⁰ Why say in one word that which can be said in more than one word? "The use of the triple words . . . was designed to be all-inclusive and applicable to any *event, condition* or *contingency*. When one of the words clearly and unmistakably expresses the intent of the parties as to a given situation or condition, the other two words, designed for other and different contingencies, do not detract therefrom or make ambiguous that which is certain."³¹

Another means of bringing emphasis to the importance of a particular provision is to state that the "provisions of this paragraph are a material consideration to [the concerned party], without which [the concerned party] would not have entered into this Agreement," or words to that effect. Stated as such, at least in theory, a court could find a want or failure of consideration (cause) if, for any reason, the involved clause could not be enforced or is breached.³² Words to

intentional or gross fault that causes damages to the other party" or which, "in advance, excludes or limits the liability of one party for causing physical injury to the other party."); La. Civ. Code art. 3471 (provisions "purporting to exclude prescription, to specify a longer period than that established by law, or to make the requirements of prescription more onerous. . ."); La. Civ. Code art. 1297 (stipulation that "there never shall be a partition . . . of a thing held in common."); La. Civ. Code art. 2369.8 (provision that a spouse renounces the right to demand partition of former community property at any time); La. R.S. 9:2713 (1991) (contract for surrogate motherhood); La. R.S. 9:2779 (Supp. 2000) (provision in a construction contract for public and private works projects to be performed in the State of Louisiana where one of the parties is domiciled in Louisiana, that disputes arising thereunder are to be resolved in proceedings to be filed in another state); La. R.S. 9:3254 (1997) (waiver by a tenant of its rights to demand the return, at the termination of the lease, of an advance deposit); La. R.S. 23:921 (1998 and Supp. 2000) (non-competition clauses).

29. *McGuffy v. Weil*, 120 So. 2d 358, 363 (La. App. 2d Cir. 1960), *amended and aff'd*, 125 So. 2d 154 (1960).

30. "Often are found, in legal documents, phrases such as 'grant, bargain and sell,' 'convey, transfer and deliver,' and 'will give and bequeath,' when usually one of the three words is adequate." *Id.* at 363.

31. *Id.*

32. "[A] party's unilateral error on the principal cause will not serve to invalidate an agreement unless the other party knew, or from the circumstances should have known, that it was the principal

this effect are akin to a contractual invocation of the provisions of Louisiana Civil Code article 1949.³³

Parties to commercial transactions which are seriously negotiated often attempt to preempt application of Article 2056, which provides that an ambiguous provision should be construed "against the party who furnished its text" by incorporating a provision to the contrary.³⁴ Many conventional agreements contain preamble paragraphs which, while not essential to the object of the contract, do serve to set forth an explanation of the overall intention of the parties. The Louisiana Supreme Court has observed that "the clauses of a contract which begin with the word 'whereas' simply state the reasons for the confection and the mental intent of the parties. That portion of a contract which follows the word 'therefore' is simply the response to the reasoning and the mental intention of the parties."³⁵

D. Province of Courts in Contractual Interpretation

Prior to a consideration of the various principles or "tools" which a court might employ in the interpretation of a contract, it is important to briefly note what a court may *not* do under the guise of interpretation.

The courts of Louisiana have long stated that it "is not within the province of any court to relieve a litigant of a bad bargain. Its only province is to render judgment in conformity with the law and evidence."³⁶ This is an obvious corollary to the principle enunciated in Louisiana Civil Code article 1983, that "[c]ontracts have the effect of law for the parties." Moreover, a "provision susceptible of different meanings must be interpreted with a meaning that renders it effective and not with one that renders it ineffective."³⁷

An example of the application of this principle is *Tahoe Corporation v. P & G Gathering Systems, Inc.*³⁸ The plaintiff was the seller under a contract to sell natural gas to the defendant. The contract stipulated a purchase price subject to escalation provisions. However, the defendant was able to sell the gas which it purchased from Tahoe on the open market for significantly more money, to the perceived detriment of the plaintiff who was locked into the contract price. The plaintiff sued the defendant gas purchaser contending, among other things, that the plaintiff should be released from obligation to sell gases at prices which it

cause." *Dunham v. Dunham*, 467 So. 2d 555, 561 (La. App. 1st Cir. 1985), writ denied 469 So. 2d 989, 990 (La. 1985).

33. "Error vitates consent only when it concerns a cause without which the obligation would not have been incurred and that cause was known or should have been known to the other party."

34. An example of such a clause is the following:

The parties hereto acknowledge and agree that this Agreement shall not be construed more favorably in favor of one than the other based upon which party drafted the same, it being acknowledged that all parties hereto contributed substantially to the negotiation and preparation of this Agreement.

35. *Succession of Ramp*, 252 La. 660, 671, 212 So. 2d 419, 423 (1968).

36. *Hinterlang v. Usner*, 41 So. 2d 455, 456 (La. 1949).

37. La. Civ. Code art. 2049.

38. 506 So. 2d 1336 (La. App. 2d Cir. 1987).

considered unfair or inequitable. The court rejected this demand, noting that "no one expected the unprecedented rise of gas prices. Tahoe cannot expect the courts to rescind its legally binding contract just because its business judgment was poor."³⁹

A court may not, under the guise of interpretation, make contracts for the parties litigant. "The duty of the court is to interpret and enforce the agreement as confected by the parties thereto."⁴⁰ Thus, although "a doubtful or ambiguous contractual provision is subject to interpretation by a court in an attempt to ascertain the true intent of the parties, it is well settled that a court is not empowered to make a contract for the parties."⁴¹

II. DETERMINING THE PARTIES' INTENT

As stated, the determination of the intent of the contracting parties is the principal objective of the interpretative process. The rules of interpretation are not ends in themselves, but are tools by which the fundamental process of intent determination might be achieved.

A. General Rules in Ascertaining Intent

1. Deletions Deemed Not Written

Although not well established in the jurisprudence, the rule appears to be that printed words which are deleted, erased or stricken by the contracting parties are to be deemed as though not written in the first instance. When a court encounters such changes, it should "put on blinders" and not read the deleted words.⁴² This rule—that deletions and erasures should simply be deemed not written and, hence, should form no part of the interpretative process—has not precluded litigants from urging the court to adopt a construction contrary to the deleted language.

At issue in *Di Cristina v. Weiser*,⁴³ was a demand by a purchaser for specific performance of a contract to sell and purchase immovable property. The "standard form" contract had a clause which provided that the purchaser would forfeit his deposit if he failed to comply with the contract "within the time specified." The printed form also included the phrase, "time being of the essence of this contract."⁴⁴ Prior to its execution, the contract was reviewed for the seller by an associate attorney, because the seller's regular attorney was ill. The proposed contract was

39. *Id.* at 1345.

40. *Atlas Lubricant Corporation v. Federal Insurance Co. of New Jersey*, 293 So. 2d 550 (La. App. 4th Cir. 1974); *Payton v. St. John*, 188 So. 2d 647 (La. App. 2d Cir. 1966).

41. *Louisiana Pacific Corporation v. Lawton*, 357 So. 2d 30, 37 (La. App. 3d Cir. 1978).

42. For example, in *Dawson v. Ohio Oil Co.*, 96 So. 508, 509 (La. 1923), the Louisiana Supreme Court construed a donation and noted that certain words had been "erased from the original, and hence form no part thereof."

43. 215 La. 1115, 42 So. 2d 868 (1949).

44. *Id.* at 1118, 42 So. 2d at 869.

approved "as to form with the exception of the phrase 'time being of the essence of this contract' which [the reviewing attorney] deleted in ink because (according to his testimony) he knew that Mr. Miller [the seller's principal lawyer] had a 'fetish' against that provision."⁴⁵ The act of sale was not passed by the date stipulated in the contract. The trial court awarded specific performance to the plaintiff (purchaser) and the defendant (seller) appealed. The defendant argued that the plaintiff was not entitled to specific performance because he was in default by failing to pass the act of sale by the stipulated date. Plaintiff responded to this argument by saying that time was not of the essence of the contract, pointing to the fact that such express language was deleted by the seller's lawyer. The court rejected this argument and denied specific performance, stating:

The contention cannot be sustained. In the first place, the deletion of the phrase "time being of the essence of this contract" did not affect the clarity of the language which remained and, therefore, strictly speaking, there is no room for interpretation—for the condition reads "in the event that purchaser fails to comply with this agreement within the time specified, the vendor shall have the right, either to declare the deposit, ipso facto, forfeited, without formality and without placing purchaser in default or the vendor may demand specific performance."⁴⁶

In other words, the court did not adopt the plaintiff's argument that striking the words "time being of the essence of this contract" manifested the parties' intent that time was *not* "of the essence of this contract."

Courts have often attempted to "read through the lines" in order to determine the import of the stricken language, from which determination some inference is drawn. In *Andrepoint v. Acadia Drilling Company*,⁴⁷ the court actually "read through" an obliterated paragraph in order to construe the mineral lease there involved. In *Andrepoint*, the lessor had stricken from a printed form of a mineral lease certain words so that the clause read "the lessee shall be responsible for all damages caused by lessee's operations."⁴⁸ Clearly, it was the purpose and intention of the lessor to broaden, rather than restrict, the contractual reparation obligation of the lessee: The lessee is responsible for *all* damages, not merely for damages to "timber and growing crops." However, when the lessor sued the lessee for damages to crops, the court noted that, "[u]nder the terms of the lease the defendant was not responsible for damages to the growing crops."⁴⁹

In order to avoid this approach, it might be preferable to "white out" the offensive language in its entirety, rather than merely "striking through" the language to be excluded. Even with this approach however, a related but unanswered question is whether, if the contract is on a standard printed form, a

45. *Id.*

46. *Id.* 1121, 42 So. 2d at 870.

47. 208 So. 2d 737 (La. App. 3d Cir. 1968), *rev'd on other grounds*, 231 So. 2d 347 (1969) (on rehearing).

48. *Id.* at 738.

49. *Id.* at 739.

court should admit into evidence a blank form for the sole purpose of informing the trier of fact as to the omitted or deleted language. In one case, the court was concerned with the "intention of the parties at the time the mineral lease was negotiated."⁵⁰ The court found that this "can best be accomplished by comparing the standard damage clause found in the original version of the mineral lease to the modified version agreed to by the parties."⁵¹ The decision does not reveal if any evidentiary objection was entered at trial.

2. *Precatory Terms Deemed Not Written*

The term "precatory" is defined in *Black's Law Dictionary* as: "[h]aving the nature of prayer, request, or entreaty; conveying or embodying a recommendation or advice or the expression of a wish, but not a positive command or direction." Although the concept ordinarily arises in the interpretation of testaments (rather than contracts), it has been stated that "[p]recatory expressions are words requesting or praying that a thing be done."⁵² "In Louisiana, it is well settled that precatory terms or recommendations in an instrument may be treated as not written."⁵³

In *Dunham v. Dunham*,⁵⁴ the court refused to hold invalid an oral contract merely because one of the subsidiary terms of the contract, involving an oral transfer of mineral interests, was held to be unenforceable, since that "request . . . was a suggestion only, in the nature of a 'precatory term.'"⁵⁵ Because that precatory provision was not the principal cause of the contract, its unenforceability did not result in the invalidation of the contract.

3. *Subsequent Additions to Printed Language*

"[I]n documents which are partly printed and partly written, the written portion prevails over the printed portion" on the theory that it represents the latest expression of the parties' will.⁵⁶ Likewise, typewritten insertions which conflict with printed portions are deemed to govern.⁵⁷

50. *Broussard v. Northcott Exploration Company, Inc.*, 481 So. 2d 125, 127 (La. 1986).

51. *Id.*

52. *Succession of Diaz*, 617 So. 2d 34, 36 (La. App. 4th Cir. 1993).

53. *Dunham v. Dunham*, 467 So. 2d 555, 563 (La. App. 1st Cir.), *writ denied*, 469 So. 2d 989, 990 (La. 1985).

54. *Id.*

55. *Id.* at 562.

56. *Rabinowitz v. Hurwitz-Mintz Furniture Co.*, 19 La. App. 811, 133 So. 498 (La. App. Orl. Cir. 1931).

57. *Dean v. Pisciotto*, 220 La. 725, 57 So. 2d 591 (1952); *Mirandona v. Aaxico Airlines, Inc.*, 143 So. 2d 805 (La. App. 4th Cir. 1962); and *Executive House Building, Inc. v. Optimum Systems Inc.*, 311 So. 2d 604, 607 (La. App. 4th Cir.), *writ denied*, 313 So. 2d 847 (La. 1975).

*Kuhn v. Stan A. Plache Real Estate Co.*⁵⁸ involved a dispute over a real estate commission. The printed purchase agreement provided, in printed language, that the commission would be earned "when th[e] [purchase] agreement is signed by both parties," without regard to whether the sale is ever consummated.⁵⁹ However, there was added, by typewriter, a clause which stated that "[s]eller agrees to pay the agent at the act of sale the amount of the commission in cash."⁶⁰ When the sale did not take place, the agent sued for the commission, relying on the printed language which did not make the commission contingent on a closing. The supreme court refused to award the commission based on the typewritten language, stating that:

Under elementary principles of interpretation of contracts, the written portions prevail over the printed portions when the two are in conflict; and, therefore, we find no difficulty in holding that the typewritten sentence providing that the commission would be paid "at the act of sale" supersedes [sic] the printed clause providing that the commission is earned when the offer is accepted.⁶¹

The same rule applies to handwritten language which is in conflict with the printed portion of a contract. In *Merrill Lynch Realty, Inc. v. Williams*,⁶² the parties entered into an agreement to buy and sell property, which provided that a portion of the purchase price would be paid in cash and the balance would be financed through a loan secured by a mortgage on the property. A printed sentence in the agreement provided that "[s]eller reserves the right to provide all or part of the above mentioned loan(s)."⁶³ However, there was added, by handwritten notation, "balance by homestead loan." The purchaser applied for, but was denied, a loan from a homestead and, consequently, did not proceed to close. The realtor instituted a concursus to resolve conflicting claims to the deposit. Noting the conflict between the printed and the typewritten language, the court applied "the rule of contract interpretation that the intent is the last expression of the parties in a printed contract and is governed by what they insert themselves."⁶⁴ Relying on the rule of *Kuhn*, the court held that the "handwritten provision that the balance would be paid by homestead loan is the last expression of the parties" which "reflects the parties' intent and makes the agreement subject to a suspensive condition concerning a particular financing method."⁶⁵

58. 249 La. 85, 185 So. 2d 210 (1966).

59. *Id.* at 91, 185 So. 2d at 212.

60. *Id.*

61. *Id.*

62. 526 So. 2d 380 (La. App. 4th Cir. 1988).

63. *Id.* at 382.

64. *Id.*

65. *Id.*, see also *Trussell v. Land*, 138 So. 910 (La. App. 2d Cir. 1932).

4. Missing Word Supplied by Judicial Interpretation

To say that the court is bound to enforce a contract as written is not to say that a court, in the proper case, may not recognize obvious errors in grammar or punctuation if such errors would serve to frustrate rather than effectuate the intention of the parties.

A case illustrating this proposition is *Housing Authority of New Orleans v. Henry Ericsson Co.*⁶⁶ In *Ericsson*, a dispute arose between the plaintiff (owner) and its defendant (contractor) as to whether "site improvements" were within the scope of the contractor's responsibility under the construction contract. The matter was submitted to arbitration and the owner brought an action to confirm the arbitrators' award in its favor. In the same judicial proceeding, the contractor filed a counterclaim seeking to have the award of the arbitrators reversed. The contractor contended that the arbitrators erred in finding that a parenthesis mark was erroneously placed in the contract. The supreme court affirmed the decision of the arbitrators and rejected the contention of the contractor, stating "that the niceties of grammar afford no safe guide in interpreting contracts, as well as laws. We think the presence of improper punctuation is no more allowable than bad grammar to change the meaning of a contract which is obvious from the construction of the whole instrument."⁶⁷

At least one court has also added a missing comma in order to interpret a compromise agreement affecting land and mineral rights. In *Doyal v. Pickett*,⁶⁸ the court interpreted the following clause in a compromise agreement whereby the plaintiff transferred the described property interests, reserving (in a later clause) the mineral rights in the "hereinabove described lands":

All of her right, title and interest in and to all of the property that was property of the marital community of acquets and gains existing between [plaintiff's parents], *except that she is to keep all sums and movable property heretofore received* and particularly including all of her right, title and interest in and to all of the following described property, [the home place and other immovable property are specifically described].⁶⁹

The plaintiff contended that the deed was not ambiguous in that it clearly and unequivocally excluded and excepted from the transfer the "home place." The court disagreed, stating:

Upon a literal reading, one could attempt to argue that the described real estate (including the home place) is excepted from transfer as there is neither a comma after the word "received" nor parentheses setting off the

66. 197 La. 732, 2 So. 2d 195 (La. 1941).

67. *Id.* at 752, 2 So. 2d at 201.

68. 628 So. 2d 184 (La. App. 2d Cir. 1993).

69. *Id.* at 187 (emphasis added).

"exception" clause emphasized above. However, this strained interpretation creates a conflict with the mineral reservation clause.⁷⁰

Likewise, where a certain, significant word is obviously omitted through inadvertence, the omitted word may be supplied by judicial interpretation and construction. For example, in *Sanders v. Rudd*,⁷¹ a lease provision read, as follows:

18. Anything in this lease to the contrary notwithstanding, if oil and/or gas production is not established or a new bona fide exploratory test is [*] drilled on or before September 14, 1982, this lease will become null and void.⁷²

The court noted that,

[u]nder the strict meaning of this language, if the lessee does not timely establish production he loses his leasehold rights, but if he does drill a well to establish production within the same time frame, he also loses his leasehold rights. The trial court found that the word *not* was inadvertently omitted from the second clause of the paragraph [marked above by the bracketed asterisk], and that the word may be supplied by judicial interpretation and construction.⁷³

Finding that the literal interpretation would be "absurd," and that "no serious contention could be made by the lessor that the language of this paragraph was intended to be so strictly construed as to render the lease itself meaningless," the court held that "it was proper to supply the omitted word and grant specific performance of the purchase agreement to the vendors."⁷⁴

5. Conformance to Object of the Contract

Louisiana Civil Code article 2048 encourages an interpretation of a word or term "susceptible of different meanings" in a manner consistent with the "object of the contract."⁷⁵ "Business contracts must be construed with business sense, as they naturally would be understood by intelligent men of affairs."⁷⁶

At issue in *Aucoin v. Fontenot*⁷⁷ was the parties' intent in a reservation by a vendor, in an act of sale of an office building, of "the use of the three small offices in the rear of said building."⁷⁸ The plaintiff (vendee) undertook to remodel the

70. *Id.* at 188.

71. 427 So. 2d 1271 (La. App. 2d Cir. 1983).

72. *Id.* at 1275.

73. *Id.*

74. *Id.* at 1276.

75. Words susceptible of different meanings must be interpreted as having the meaning that best conforms to the object of the contract.

76. *Gulf Shores Leasing Corporation v. Avis Rent-A-Car Systems, Inc.*, 441 F.2d 1385, 1390 n.5 (5th Cir. 1971).

77. 304 So. 2d 754 (La. App. 3d Cir. 1974).

78. *Id.* at 755.

offices and converted one of the offices to a coffee shop. When a dispute arose between the parties as to which of the several offices "in the rear of said building" was the subject of the defendant (vendor)'s express reservation, the plaintiff contended that one of the three "offices" reserved by the vendor was a bathroom. The court rejected this argument, stating that "the plain and ordinary meaning of the words 'Three small offices' would not include a bathroom. [O]bviously, the parties intended for defendant to have the use of the room known as the 'Coffee Shop.'"⁷⁹ Reading the reservation in view of the object of the contract, the court found that the parties could not have contemplated that one of the reserved "small offices" was a bathroom.

B. *Resort to Extrinsic Evidence*

1. *Words of Art and Technical Terms*

An undefined term contained in a contract should "be given its plain, ordinary and popular meaning."⁸⁰ However, rare is the contract which is written and executed at a time when the parties know with certainty that it will become the subject of litigation. It is for this reason, as well as the fact that the contracting parties are, by definition, no strangers to the concepts involved, that parties often fail to define terms which are well known to them, but foreign to the judge. These are "words of art and technical terms."⁸¹ When litigation over the meaning of a contract ensues, a court is often called upon to interpret terms which the parties have failed to define.

Because the (undefined) terms are generally outside of the experience of the trier of fact, the court may receive parol expert testimony as to the meaning of the term within the concerned industry. For example, in a case interpreting a building contract, the court was called upon to determine, as between a plumbing subcontractor and an air conditioning subcontractor, who was responsible for the installation of "air conditioning condensate drain lines."⁸² The court received the expert testimony of a "consulting engineer of 20 years experience who writes mechanical engineering contract specifications for plumbing and air conditioning for the architect and who has supervised the construction under this phase of such contracts," finding him to be "competent to express his opinion as to who customarily is required to do what work."⁸³

In another case, the meaning of the term "meter station" as used in a contract between a sandblasting and painting contractor and the owner and operator of

79. *Id.* at 756.

80. *Foret v. Louisiana Farm Bureau Casualty Insurance Company*, 582 So. 2d 989, 990 (La. App. 1st Cir. 1991); *see also* *Coates v. Northlake Oil Company, Inc.*, 499 So. 2d 252, 255 (La. App. 1st Cir. 1986), *writ denied*, 503 So. 2d 476 (La. 1987).

81. La. Civ. Code art. 2047.

82. *Friday's Plumbing & Heating Co., Inc. v. Byers*, 415 So. 2d 256, 257 (La. App. 2d Cir. 1982).

83. *Id.* at 259.

natural gas pipelines was resolved by resort to the "industry's definition of the term."⁸⁴ After receiving expert testimony, the court determined that the work envisioned by the contract to repair and maintain a "meter station" involved work "pertaining to a well" with the result that the indemnity provisions of the contract were invalidated under the Louisiana Oilfield Anti-Indemnity Act.⁸⁵

Modern commerce often involves parties from different states. Consequently, when a contract involves terms of art, foreign to the Louisiana civil law tradition, courts may be called upon to determine what such a term means. In *Piper v. Central Louisiana Electric Co.*,⁸⁶ the substance of a written contract indicated that the defendant (electric company) intended to lease space on its utility poles to a cable television corporation. However, this provision conflicted with the virtually unknown common law label of "license," which was contained in a contract paragraph stipulating that the corporation's rights were to be and remain a "mere license." The court held that the intent of the parties was not to be measured by attributing undue weight to the common law label of "license," but rather, the substance and express terms of contract were to be examined in light of the Louisiana Civil Code to determine the true import and species of contract engaged by the parties, whether or not it was characterized or classified in the civil law.

2. Role of Custom and Usage

The role of custom and usage in the interpretative process is established by Louisiana Civil Code article 2053.⁸⁷ Additionally, "[u]sage, as intended in [Articles 2053-2054], is a practice regularly observed in affairs of a nature identical or similar to the object of a contract subject to interpretation."⁸⁸

It is not just *any* supposed custom which, according to Louisiana Civil Code article 3, supplies a source of law applicable to a given situation, but only a custom resulting "from practice repeated for a long time and generally accepted as having acquired the force of law." Moreover, under the clear language of Louisiana Civil Code article 2053, it is only when the contract contains a "doubtful provision" that custom may operate as an aid to interpretation. As stated in the comments to Article 2053, "courts may resort to equity [and custom] for guidance only when the meaning of a provision is in doubt. [Courts] may not do so in order to enlarge or restrict the scope of a contract or provision whose meaning is apparent."⁸⁹

84. *Lloyds of London v. Transcont. Gas Pipe Line Corp.*, 101 F.3d 425, 429 (5th Cir. 1996).

85. La. R.S. 9:2780 (1991).

86. 446 So. 2d 939 (La. App. 3d Cir. 1984).

87. La. Civil Code article 2053 provides, "A doubtful provision must be interpreted in light of the nature of the contract, equity, usages, the conduct of the parties before and after the formation of the contract, and of other contracts of a like nature between the same parties."

88. La. Civ. Code art. 2055.

89. *See C. J. Meeker & Co. v. Klemm*, 11 La. Ann. 104, 105 (La. 1856) ("Now, a usage regulating the enforcement of an obligation which violates the principle upon which the obligation itself is based, and without which it would not exist at all, cannot be maintained.").

In *Crook v. Tensas Basin Levee District*,⁹⁰ a levee contractor sought to judicially enforce a custom that "extra compensation would be paid for the work of stumpage and clearing," despite the fact that the contract which plaintiff signed "contained the specification that 'grubbing and stumping should be done without extra compensation.'"⁹¹ The supreme court affirmed the action of the trial court in dismissing, on an exception of no cause of action, the suit of plaintiff, holding that the custom could not override the express language of the contract.

The existence of a supposed custom must be both established and known to the parties to whom it purportedly relates. In *Nebel v. Wise & Miller*,⁹² a real estate salesman sued his former employer seeking to recover commissions allegedly due on sales consummated after the plaintiff left the employ of the defendant. The defendant contended that it was the custom of the office that a departing employee thereby lost his right to commissions. The court, citing Articles 3 and 1966 (now repealed) of the Louisiana Civil Code, stated that "custom or usage may be applied to the solution of ambiguous contracts *only* when both parties to the contract are *thoroughly* familiar with the custom."⁹³ The defendant failed to carry its burden of establishing the salesman's knowledge of the existence of the custom on which it relied.

In *Par-Co Drilling, Inc. v. Franks Petroleum Inc.*,⁹⁴ the court considered evidence of the "custom in the industry" in order to construe a contract for the drilling of an oil well. "It is well settled that custom of the place and the usual and customary manner of fulfilling like contracts is persuasive in determining the intention of the parties under a contract not specific in its wording."⁹⁵

3. Course of Dealing

Courts consider that one of best ways to determine what parties intended in a contract is to examine the method in which the contract was performed, particularly if performance has been consistent for a period of many years.⁹⁶ The manner in which parties have construed and thereby administered their own contract will be

90. 51 La. Ann. 285, 286, 25 So. 88 (La. 1899).

91. *Id.* at 289, 25 So. at 89.

92. 6 La. App. 773 (La. App. Orf. Cir. 1927).

93. *Id.* at 775.

94. 360 So. 2d 642, 644 (La. App. 3d Cir. 1978).

95. The court cited *Terrell v. Alexandria Auto Co.*, 12 La. App. 625, 125 So. 757 (La. App. 2d Cir. 1930) and *Fontenot's Rice Drier, Inc. v. Farmers Rice Milling Co.*, 329 So. 2d 494 (La. App. 3d Cir.), *writ denied*, 333 So. 2d 239 (La. 1976).

96. *Spohrer v. Spohrer*, 610 So. 2d 849 (La. App. 1st Cir. 1992). *See also* *Belle Pass Terminal, Inc. v. Jolin, Inc.*, 634 So. 2d 466 (La. App. 1st Cir.), *writ denied*, 638 So. 2d 1094 (La. 1994); *reconsideration denied*, 640 So. 2d 258 (La. 1994); *reconsideration denied* 642 So. 2d 185 (La. 1994); *Knecht v. Bd. of Trustees for State Colleges and Universities and Northwestern State Univ.*, 591 So. 2d 690, 694 (La. 1991) ("When the intent of the parties is doubtful, the court may look to the manner in which that intent was carried out by both parties, or by one with the express or implied assent of the other.").

given weight by the court which is later called upon to resolve a contractual dispute between the parties. This is sometimes called a "course of dealing."⁹⁷

In *Kenner Industries, Inc. v. Sewell Plastics, Inc.*,⁹⁸ a subcontractor was engaged to provide sand to a construction site. The contract between the plaintiff (subcontractor) and the defendant (general contractor) provided that the plaintiff would "furnish pump sand delivered to the job site and necessary labor and equipment to spread and compact in place to within 95% standard proctor method of testing. Unit Price \$4.20 compacted in place."⁹⁹ Notably, the contract did not specify the unit of measurement by which the "unit price" would be calculated.¹⁰⁰ After a dispute arose as to the meaning of the contract, the court resolved the dispute by referring to the manner in which the parties had operated under the subcontract, finding that the contractor's "silence indicated assent to [the subcontractor's] interpretation of the contract."¹⁰¹

Likewise, in *Gamble v. D. W. Jessen & Associates*,¹⁰² the third circuit found that acquiescence for "a period of many years" in a given method for calculating the plaintiff's salary indicated the parties' intent to compensate him as such under their contract.

Although not stated in these terms, the circumstances under which the courts have applied this principle of "course of dealing" are often not unlike circumstances whereby the court might find that a party is estopped to urge a construction contrary to the manner in which it has executed (or acquiesced in the execution of) its agreement. By holding a party to the consequences of its prior administration of a contract, particularly where the other party has itself performed or accepted a performance, in reference to such conduct, the court promotes uniformity by effectuating the intention of the parties in a manner consistent with their own actions.

4. Equity

In the absence of a specific contractual stipulation dealing with a particular situation, principles of equity govern.¹⁰³ The notion that one may resort to principles of "equity" only when "the parties made no provision for a particular situation" is consistent with the underpinnings of the civil law action *de in rem verso* in that such equitable remedy (usually called "unjust enrichment") *only*

97. Cf. La. R.S. 10:1-205 (3) (1983) ("A course of dealing between parties and any usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware give particular meaning to and supplement or qualify terms of an agreement.").

98. 451 So. 2d 557 (La. 1984).

99. *Id.* at 558.

100. *Id.*

101. *Id.* at 560.

102. 509 So. 2d 1041 (La. App. 3d Cir.), writ denied, 514 So. 2d 454 (La. 1987).

103. *Minyard v. Curtis Products, Inc.*, 251 La. 624, 652, 205 So. 2d 422, 432 (La. 1968).

operates if "there is no other remedy at law, i.e., the action is subsidiary or corrective in nature."¹⁰⁴

The Civil Code instructs that "[e]quity, as intended in [Louisiana Civil Code articles 2053 and 2054], is based on the principles that no one is allowed to take unfair advantage of another and that no one is allowed to enrich himself unjustly at the expense of another."¹⁰⁵

For example, in a suit against a former employer, the employee sought to recover the proportionate part of a bonus which was provided by the employment contract.¹⁰⁶ The contract provided for the payment of a bonus of "30% of Net revenue before taxes and bonuses [to the shareholders] as determined by the audited financial statement."¹⁰⁷ The fiscal year of the corporation was from May 1 to April 30 of the next year. After the employee resigned on January 30, 1986, he demanded "the proportion of three/fourths of his bonus for that fiscal year."¹⁰⁸ The employer refused, contending that the employee was required to complete the fiscal year before being eligible for the bonus. The trial court held "that the plaintiff did not have to complete the year's service in order to receive a bonus, because no such requirement was made in the parties' 1984 written agreement."¹⁰⁹ The appellate court affirmed, noting that "[e]quity and usage in this instance regards as implied in the contract that the parties intended that the bonus would be paid, proportionately, if the employment was terminated at any time other than the end of a fiscal year."¹¹⁰

5. Resort to Other Contracts of a Like Nature

Louisiana Civil Code article 2053 also stipulates the relevance of "other contracts of a like nature between the same parties." In *Knipmeyer v. Diocese of Alexandria*,¹¹¹ the court was called upon to interpret a printed employment agreement in which certain blanks had not been completed. These blanks in the printed form envisioned the insertion of a certain date by which a party who did not desire to continue employment would notify the other party of such desire to discontinue the employment relationship. Relying on Article 2053, the court considered a series of "other contracts" and stated "that any doubt caused by the failure to insert dates within the blanks of Paragraph O *can* otherwise be resolved."¹¹² In making this finding, the court specifically determined that it was

104. *Minyard v. Curtis Products, Inc.*, 251 La. 624, 652, 205 So. 2d 422, 432 (La. 1968).

105. La. Civ. Code art. 2055.

106. La. Civ. Code art. 2054. *Dore v. WHC Lease Service, Inc.*, 528 So. 2d 235 (La. App. 3d Cir. 1988).

107. *Id.* at 237.

108. *Id.*

109. *Id.*

110. *Id.* at 238.

111. 492 So. 2d 550 (La. App. 3d Cir. 1986).

112. *Id.* at 556.

not necessary to interpret the contract against the defendant who furnished the text of the standard form contract, as envisioned by Louisiana Civil Code article 2056.

6. Parol Evidence

"As a general rule, parol evidence is inadmissible to vary, modify, explain or contradict a writing."¹¹³ However, except in the case of immovable property,¹¹⁴ the parol evidence rule is an evidentiary rule, not a substantive rule, such that inadmissible parol evidence admitted without objection may be considered by the court in reaching a decision.¹¹⁵

In *Investors Associates Ltd. v. B.F. Trappey's Sons, Inc.*,¹¹⁶ the court noted that:

Contracts, subject to interpretation from the instrument's four corners without the necessity of extrinsic evidence, are to be interpreted as a matter of law. The use of extrinsic evidence is proper only where a contract is ambiguous after an examination of the four corners of the agreement.

However, as pointed out by the court in *Investors Associates, Ltd.*, there are exceptions which permit reference to parol and other outside evidence.

When the terms of a written contract are susceptible of more than one meaning, or there is uncertainty or ambiguity as to its provisions, or the intent of the parties cannot be ascertained from the language employed, or fraud is alleged, parol evidence is admissible to clarify the ambiguity, show the intention of the parties, or prove fraud.¹¹⁷

C. Methods of Reasoning in Contractual Interpretation

1. The "Greater Includes the Lesser"

The scope of a contract is relevant under Louisiana Civil Code article 2052.¹¹⁸ Consequently, the specification of a general principle, broad in scope, will be held

113. Kean v. Lemaire, 451 So. 2d 151, 154 (La. App. 1st Cir. 1984).

114. La. Civ. Code art. 1839.

115. Newman v. Cary, 466 So. 2d 774 (La. App. 4th Cir. 1985). See also La. Code Evid. art. 103A(1). ("Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and . . . [w]hen the ruling is one admitting evidence, a timely objection or motion to admonish the jury to limit or disregard appears of record, stating the specific ground of objection. . . .")

116. 500 So. 2d 909, 912 (La. App. 3d Cir.), writ denied, 502 So. 2d 116 (La. 1987).

117. Borden, Inc. v. Gulf States Utilities Co., 543 So. 2d 924, 927 (La. App. 1st Cir.), writ denied, 545 So. 2d 1041 (La. 1989); Schroeter v. Holden, 499 So. 2d 309 (La. App. 1st Cir. 1987).

118. La. Civil Code art. 2052 provides, "When the parties intend a contract of general scope but, to eliminate doubt, include a provision that describes a specific situation, interpretation must not restrict the scope of the contract to that situation alone."

to include a lesser included principle on the theory that "the greater includes the lesser."¹¹⁹

In *Craten v. Aetna Life Insurance Co. of Hartford, Connecticut*,¹²⁰ an insured sued to recover a "Permanent Total Disability Benefit" under a disability policy, which provided that an injured party "shall be deemed totally and permanently disabled" if the injured suffered the "irrevocable loss . . . of the use of both hands or both feet or of one hand and one foot."¹²¹ Mr. Craten suffered a slight injury to one hand and the "entire and irrevocable loss" of the use of the other hand. Rejecting the insurer's contention that the insured did not meet the requirement that "both" hands be disabled, the court stated that the stipulation "does not preclude the idea that the entire and irrevocable loss of the use of only one hand or one foot might be, to an uneducated and unskilled laborer, total and permanent disability."¹²² "The mentioning, in the policy, of the . . . loss of the use of both hands or both feet, or of one hand and one foot, is done merely by way of illustration, and to make it plain that the insurance company will not dispute that any one of these specified afflictions is total disability."¹²³ The court specifically cited Article 1962 which was the source article for Article 2052.

2. *Ejusdem Generis Doctrine*

It is not uncommon for a contract to state, by way of illustration, the things or principles which the contract is intended to regulate. According to *Black's Law Dictionary*, the "*ejusdem generis*" doctrine provides that where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned.¹²⁴

This principle also illustrates the doctrine "*noscitur a sociis*." This latter doctrine contemplates that general and specific words are associated with and take color from each other.

In *Holloway Gravel Co., Inc. v. McKowen*,¹²⁵ it was said that the "words 'mineral rights' necessarily must be read in connection with the things subsequently named, to-wit: 'oil rights' and 'gas rights' and should be confined to things of that nature."¹²⁶ Hence, in this suit seeking to determine if a reservation in an act of sale of "mineral, oil and gas rights" included within its scope the right

119. *Genina Marine Services, Inc. v. Mobil Exploration & Prod. Southeast, Inc.*, 506 So. 2d 922, 929 (La. App. 1st Cir. 1987) (finding that, because an express agency relationship existed, the agent had, "at the very least," an apparent authority, under the doctrine that "[t]he greater includes the lesser").

120. 186 La. 757, 173 So. 306 (La. 1937).

121. *Id.* at 767, 173 So. at 309.

122. *Id.* at 768, 173 So. at 309.

123. *Id.*

124. *Black's Law Dictionary* 535 (7th ed. 1999).

125. 200 La. 917, 9 So. 2d 228 (1942).

126. *Id.* at 929, 9 So. 2d at 232-33.

to explore for sand and gravel, it was held that it did not include these "hard" minerals.

Louisiana Civil Code article 3506(2) defines the term "such as" to be "words employed to give some example of a rule, and are never exclusive of other cases which that rule is made to embrace." Parties often endeavor to invoke this principle by using phrases like "including, but not limited to," or "including, by way of illustration, but without limiting the generality of the foregoing," or other words to that effect.

3. *Inclusio Unius Est Exclusio Alterius Doctrine*

Articles 2050 and 2051 give rise to the well recognized rule that the "inclusion of one is the exclusion of others."¹²⁷ It is often held that the inclusion of one thing or person operates by implication to exclude all other things or persons.¹²⁸ The rationale for this principle of construction is that, where the parties have named, as an object of the contract, one thing or person, and have not by words invited the application of the "*ejusdem generis*" doctrine, it is to be presumed that the named thing or person is exclusive and not merely illustrative.

Generally, unless a contrary intention appears from the contract as a whole, the meaning of general words will be restricted by the more specific terms or descriptions of the subject matter. Thus, in *Breaux v. Rimmer & Garrett, Inc.*,¹²⁹ the court was presented with the determination of the intention of the parties to an indemnity provision. The "hold harmless" clause contained a general "indemnification against [all actions of any character for injuries or damages received on account of the operations of the contractor]."¹³⁰ The clause was "followed by specific words providing for: (1) indemnification for neglect or misconduct of the contractor, (2) indemnification for use of unacceptable materials, (3) indemnification on patent infringements, and (4) indemnification from workmen's compensation claims."¹³¹ In finding that the specific words served to restrict the earlier general indemnification language, the court noted the "general rule of construction of contracts that, unless a contrary intention appears from the contract as a whole, the meaning of general words will be restricted by the more specific terms or descriptions of the subject matter."¹³² The court found that the "obvious purpose of the indemnity clause, considered as a whole, was to make the contractor liable for matters within its orbit of responsibility."¹³³

127. La. Civ. Code art. 2050 provides: "Each provision in a contract must be interpreted in light of the other provisions so that each is given the meaning suggested by the contract as a whole." La. Civ. Code art. 2051 provides: "Although a contract is worded in general terms, it must be interpreted to cover only those things it appears that parties intended to include."

128. *DeLarge v. Dep't. of Fin.*, 672 So. 2d 1025, 1029 (La. App. 4th Cir. 1996).

129. 320 So. 2d 214 (La. App. 3d Cir. 1975).

130. *Id.* at 219.

131. *Id.*

132. *Id.*

133. *Id.*

It is not uncommon for a commercial agreement to stipulate a particular remedy in the event of a breach by a contracting party. In such cases, the question is presented as to whether this doctrine would operate to render the contractually stipulated remedy to be exclusive of other remedies at law. However, there is seemingly a conflict in the jurisprudence relative to the issue of whether a contractual provision which stipulates a particular remedy in the case of a breach precludes the obligee's resort to other remedies at law. In other words, does the fact that a contract sets forth a particular remedy in the case of a breach mean that the obligee may not seek to enforce other remedies which the law might otherwise provide? Illustrative of this proposition, to the affirmative, are *Fogle v. Feazel*,¹³⁴ (lease contract specified that, in the case of a breach, the lease would lapse) and *Heirs of Gremillion v. Rapides Parish Police Jury*,¹³⁵ (stipulated damages).¹³⁶ On the other hand, to the contrary is *Queensborough Land Co. v. Cazeaux*,¹³⁷ where the court rejected the defendant's "contention that by providing in their contract these particular remedies of injunction and damages the parties intended that these remedies should be exclusive."¹³⁸ The *Queensborough* court assumed that the defendant's contention "is sought to be sustained by the argument *inclusio unius est exclusio alterius*. We make this assumption, as our mind suggests no other reason that could be adduced in support of said contention. The argument is strong; so much so, indeed, that Article 1962, predecessor to Article 2052, Louisiana Revised Civil Code was adopted for the very purpose of defeating it."¹³⁹

D. When All Else Fails—The Aid of Presumptions in Contractual Interpretation

1. Standard Form Contracts

The construction of a "standard form contract" is governed by Louisiana Civil Code article 2056.¹⁴⁰ These are generally called "adhesion contracts."¹⁴¹ "Broadly defined, a contract of adhesion is a standard contract, usually in printed form, prepared by a party of superior bargaining power for adherence or rejection of the

134. 201 La. 899, 10 So. 2d 695 (1942).

135. 493 So. 2d 584 (La. 1986).

136. See La. Civ. Code art. 2007 ("An obligee may demand either the stipulated damages or performance of the principal obligation, but he may not demand both unless the damages have been stipulated for mere delay.").

137. 136 La. 734, 67 So. 641 (1915).

138. *Id.* at 738-39, 67 So. at 646.

139. *Id.* at 739, 67 So. at 646.

140. In case of doubt that cannot be otherwise resolved, a provision in a contract must be interpreted against the party who furnished its text. A contract executed in a standard form of one party must be interpreted, in case of doubt, in favor of the other party.

141. "Not always are contracts formed through a process of negotiation and bargaining. Necessities of modern life have gradually developed a kind of contract one of the parties to which is not free to bargain." Saul Litvinoff, *Obligations* § 194, at 346, in 6 Louisiana Civil Law Treatise (1969).

weaker party. Often in small print, these contracts sometimes raise a question as to whether or not the weaker party actually consented to the terms."¹⁴²

While Article 2056 requires an interpretation of a "standard form of one party . . . in favor of the other party," this rule "applies only to the case where doubt as to the meaning of a contract cannot be *otherwise* resolved."¹⁴³ Hence, this notion of the resolution of doubt by other means "necessarily refers to preceding articles in the Code governing interpretation of contracts."¹⁴⁴

2. Ambiguity Construed Against Draftsman

In addition to the "standard form contract," Article 2056 is also concerned with the resolution of a "doubtful provision." It has long been held in Louisiana that any doubt or ambiguity as to the meaning of a contract must be eliminated by interpreting the contract against the party who prepared it.¹⁴⁵

The underlying premise here is that a party to a contract who "furnished its text" is in the best position to articulate with some clarity the terms of "the deal," failing which the drafting party will be held to suffer the consequences of any uncertainty or lack of clarity which that party might have avoided. In other words, *caveat scrivener!*

In *B. F. Edington Drilling Co. v. Yearwood*,¹⁴⁶ a written agreement furnished by a driller provided that the driller would install a pump "to produce 1000 gpm." Since this language was ambiguous, the driller (who prepared the contract) was held to have guaranteed that the well would in fact produce 1000 gpm, rather than that pump furnished by driller would be *capable* of producing that amount. Since the well did not so produce, the driller's demand for recovery of contract price was denied.

While the rule is very clear that, in the event of an ambiguity, the contract is to be construed against the party "who furnished its text," some courts have stated that ambiguities in a lease are to be mechanically construed in favor of the lessor and against the lessee.¹⁴⁷ If, in these cases, the text was furnished by the lessee, then the cases properly apply this rule of interpretation. However, since these cases do not reveal any factual inquiry about who actually provided the text, it is not proper to cite these cases for the proposition that ambiguities in a lease are, in all

142. *Golz v. Children's Bureau of New Orleans, Inc.*, 326 So. 2d 865, 869 (La. 1976)

143. *Melerine v. Boba*, 664 So. 2d 148, 150 (La. App. 4th Cir. 1995), *writ denied*, 669 So. 2d 418 (La. 1996).

144. *Id.*

145. *Kuhn v. Stan A. Plauche Real Estate Co.*, 249 La. 85, 185 So. 2d 210 (1966); *Kenner Indus., Inc. v. Sewell Plastics, Inc.*, 451 So. 2d 557 (La. 1984); *The Ouachita Nat'l Bank in Monroe v. Williamson*, 338 So. 2d 172 (La. App. 2d Cir. 1976).

146. 239 La. 303, 118 So. 2d 419 (1960).

147. *See, e.g., Rives v. Gulf Refining Co. of La.*, 133 La. 178, 194, 62 So. 623, 629 (1913) ("Mr. Thornton, in his work, [Thornton on the Law Relating to Oil and Gas], asserts that oil and gas leases are construed most strongly against the lessee and in favor of the lessor, citing authorities at page 103."). *But see Hunt Trust v. Crowell Land & Mineral Corp.*, 210 La. 945, 28 So. 2d 669 (1946) (finding the *Rives* treatment of this issue to be *dictum*).

contexts and under all circumstances, to be resolved in favor of the lessor and against the lessee. To illustrate, there are certain institutional landlords in Louisiana which provide their own lease form which is both sophisticated and unique. Experience suggests that these lessors greatly resist any suggestion that the form should be modified or revised, even, in some instances, to the end that the lessor will decline to lease rather than amend its form. In these cases, it is totally illogical to construe any ambiguity in such a lease in favor of the lessor (who provided the text) and against the lessee (whose requests for contractual relief were rejected).

Where a contract is the result of negotiation between the parties, the rule is not dispositive as there is no single drafter against whom the contract is to be interpreted. For example, in *Shell Offshore, Inc. v. Marr*,¹⁴⁸ the court stated that "neither party is deemed to be the scrivener when, as here, the initial draft is modified and remodified in a series of exchanges between the parties to produce an execution draft reflecting give and take between obligor and obligee."¹⁴⁹

Additionally, a contract need not be construed in its entirety against one or the other party. Thus, in one situation where a contract was found to be on the letterhead of one party (who presumably drafted or at least prepared it), an ambiguous sentence contained in the contract was construed against the other party who, according to the court, had drafted that particular sentence.¹⁵⁰ It is, perhaps, for this reason that some transactional lawyers retain in their files drafts or telecopies which reflect the negotiating process and the specific contributions of each party to the negotiated contract.

Finally, if despite an application of the other rules, there remains "doubt that cannot be otherwise resolved," the "contract must be interpreted against the obligee and in favor of the obligor of a particular obligation."¹⁵¹

3. Strict Construction

a. Penalty Provisions

Penal statutes are to be strictly construed and all ambiguities concerning the ambit of the penalty should be resolved in favor of lenity.¹⁵² Apparently, the same rule of construction applies to contractual provisions which impose a penalty. In *Graham v. Lieber*,¹⁵³ a contractor sued a homeowner for monies owed under a contract for the construction of a residence. Defendant reconvened for damages, including liquidated damages for the delay in completion of the work. The court

148. 916 F.2d 1040 (5th Cir. 1990).

149. *Id.* at 1046.

150. *Car Kits, Inc. v. Bolt-on Parts, Inc.*, 439 So. 2d 479 (La. App. 1st Cir. 1983).

151. La. Civ. Code art. 2057. Nevertheless, "if the doubt arises from lack of a necessary explanation that one party should have given, or from negligence or fault of one party, the contract must be interpreted in a manner favorable to the other party whether obligee or obligor." *Id.*

152. *Redemer v. Hollis*, 347 So. 2d 48 (La. App. 2d Cir.), *writ denied*, 350 So. 2d 897 (La. 1977).

153. 191 So. 2d 204 (La. App. 2d Cir. 1966), *writ denied*, 192 So. 2d 371 (La. 1966).

rejected the homeowner's reconventional demand for delay damages, noting that "penalty provisions of a contract must be strictly construed."¹⁵⁴ Because the literal terms of the contract did not support the imposition of delay damages, they were denied.

But, "strict construction" in whose favor? A penalty provision should be construed against the party seeking its imposition.¹⁵⁵ Said another way, a party seeking to enforce a contractual penalty must demonstrate that it "has dotted its 'i's' and crossed its 't's.'"

Louisiana law has long characterized an award of attorney's fees as being penal in nature.¹⁵⁶ As such, the court must construe strictly the contract (or statute) allegedly forming the basis for this penal award, and grant such fees *only* in cases which are clear and free from doubt.

Closely akin to the rule of strict construction of penalty provisions, is the rule that forfeitures are not favored and will not be maintained unless it is plain that every reasonable requirement of the contract has been followed.¹⁵⁷ "However, the fact that forfeitures are not favored in our law does not mean that contractual provisions calling for forfeitures are to be ignored."¹⁵⁸

b. Interpretation of Predial Servitudes

"A predial servitude is a charge on a servient estate for the benefit of a dominant estate."¹⁵⁹ "Predial servitudes may be established by an owner on his estate or acquired for its benefit."¹⁶⁰ Consequently, "[t]he establishment of a predial servitude by title is an alienation of a part of the property to which the laws governing alienation of immovables apply."¹⁶¹ Moreover, since "[p]redial servitudes are established by all acts by which immovables may be transferred,"¹⁶² issues may arise relative to the interpretation of those acts. These issues may concern the existence, extent or manner of exercise of the predial servitude. "Doubt as to the existence, extent, or manner of exercise of a predial servitude shall be resolved in favor of the servient estate."¹⁶³

"It is a cardinal rule of interpretation that, in case of doubt, instruments purporting to establish predial servitudes are always interpreted in favor of the owner of the property to be affected. The rules incorporate into Louisiana law the

154. *Id.* at 207.

155. *Albe v. Albe*, 703 So. 2d 756 (La. App. 4th Cir. 1997), *writ denied*, 709 So. 2d 757 (1998).

156. *Cracco v. Barras*, 520 So. 2d 371, 372 (La. 1988); *Ferrier v. Jordache-Ditto's*, 662 So. 2d 14, 20 (La. App. 3d Cir. 1995), *writ denied*, 666 So. 2d 1100 (La. 1996); *Finley v. Safeco Ins. Co.*, 511 So. 2d 457, 461 (La. App. 3d Cir. 1987); *Moore, Romero & Co. v. Nan Corp.*, 458 So. 2d 675, 679 (La. App. 3d Cir. 1984).

157. *Schultz v. Texas & Pac. Ry. Co.*, 191 La. 624, 186 So. 49 (1938).

158. *Bender v. La. & Ark. Ry. Co.*, 255 So. 2d 849, 851 (La. App. 2d Cir. 1972).

159. La. Civ. Code art. 646.

160. La. Civ. Code art. 697.

161. La. Civ. Code art. 708.

162. La. Civ. Code art. 722.

163. La. Civ. Code art. 730.

civilian principle that any doubt as to the free use of immovable property must be resolved *in favorem liberatatis*.¹⁶⁴ This principle was expressed by the Louisiana Supreme Court when it stated that "any doubt as to the interpretation of a servitude encumbering property must be resolved in favor of the property owner."¹⁶⁵

Somewhat akin to the doctrine of strict construction, this principle has been applied in other contexts. For example, in *Whitehall Oil Co. v. Heard*,¹⁶⁶ the question was presented as to whether a landowner had created a single mineral servitude over contiguous tracts or a series of multiple servitudes, each requiring a separate use. The issue was resolved in favor of the latter interpretation, as it was the interpretation which favored the owner of the servient estate. Judge Tate stated:

Ultimately, we conclude that, where the instrument could as reasonably be interpreted either way, the proper interpretation is that which least restricts the ownership of the land conveyed. . . .¹⁶⁷

c. As Directed by Positive Law

Certain types of nominate contracts must be strictly construed by reason of provisions of positive law. For example, Louisiana Civil Code article 2725, recognizes that a "lessee has the right to underlease, or even to cede his lease to another person, unless this power has been expressly interdicted." The article further admonishes that such a contractual provision "is always construed strictly." Relying on this article, the fourth circuit noted that "the covenant is for the benefit of the lessor because it is regarded as in his interest to determine who shall be a tenant of his property."¹⁶⁸

Other examples include an ordinary suretyship which must be strictly construed in favor of the surety.¹⁶⁹ This instruction is consonant with the rule that suretyship "must be express and in writing."¹⁷⁰

III. CONCLUSION

At the outset, it was noted that the most fundamental tenet which regulates the interpretation of contracts is that the "interpretation of a contract is the determination of the common intent of the parties." It is the purpose of this article to identify those principles or "tools" of interpretation which might be employed in order to achieve this paramount objective. Predictability and reliability in commercial relationships are promoted when disputes as to the meaning and import

164. La. Civ. Code art. 730 cmt. (b).

165. *McGuffy v. Weil*, 240 La. 758, 767, 125 So. 2d 154, 158 (1960).

166. 197 So. 2d 672 (La. App. 3d Cir.), writ denied, 199 So. 2d 923 (La. 1967).

167. *Id.* at 678.

168. *Gamble v. New Orleans Housing Mart, Inc.*, 154 So. 2d 625, 626 (La. App. 4th Cir. 1963).

169. La. Civ. Code art. 3044.

170. La. Civ. Code art. 3038.

of a contract are minimized. An understanding of the governing principles should facilitate a proper interpretation of contracts in a manner which both accommodates and achieves "the common intent of the parties."

